IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 50 OF 2006.

Shri Vijaykumar A. Lawande,
Chimbel, Goa. .... Appellant.

Versus

The Bank of Baroda,
Through its General Manager,
and another. .... Respondents.

Mr. A. Kakodkar, Advocate for the Appellant.

Mr. R. G. Ramani, Advocate for the Respondent No.1.

CORAM: SMT. RANJANA DESAI, J.

DATE: 7th JULY, 2006.

P.C.:

The plaintiff filed Special Civil Suit No. 86/05/B against the respondents/defendants for declaration that defendant 1 is invoking Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the said Act for short) in respect of the suit flat and that action is fraudulent and for a further declaration that defendants 1 and 2 have no right or title in respect of the suit flat as it is not a secured asset in favour of defendants 1 and 2 and any agreement between defendants 1 and 2 is not binding on the plaintiff.

2. The facts as disclosed in the plaint are that the appellant/plaintiff

is the owner of the suit flat. He claims to have purchased the suit flat from M/s T.R. Constructions under agreement dated 9.02.99. For the purchase of the said flat, he took finance from LIC Housing Finance Limited by creating a mortgage in respect of the suit flat. Thereafter the plaintiff entered into an agreement dated 23.07.01 with defendant 2. Under the agreement the plaintiff sold the suit flat to defendant 2 for a consideration of Rs. 9 lakhs. Defendant 2 gave a cheque drawn on Oriental Bank in respect of earnest money of Rs.1,35,000/- and so far as the balance amount is concerned, defendant 2 gave two cheques to defendant 1 for payment thereof. Defendant 2 told the plaintiff not to deposit the cheques, stating that there was no money in the account and that he will replace the cheques. Thereafter there are subsequent agreements entered into between the plaintiff and defendant 2, but the fact remains that the plaintiff claims to be in possession of the suit flat and according to him defendant 2 has failed to pay money him.

3. It is the plaintiff's case that he got to know from the Society in which the flat is situated that the officers of defendant 1 were making inquiries about the suit flat. According to the plaintiff he has not received any communication or intimation from defendant 1. On 25.09.05 when the plaintiff visited the suit flat he found that defendant 1 had sealed the suit flat. Through a public notice issued by defendant 1 he got to know that

defendant 1 claims that the suit flat is in possession of the authorised officer of the first defendant. Further the plaintiff got to know that the proceedings under the said Act have been initiated by defendant 1. According to the plaintiff the provisions of the said Act are not applicable to the suit flat as he has not created any security interest by mortgaging the said flat with defendant 1.

4. In this suit defendant 1 filed an application for rejection of the plaint under Order. 7, Rule 11(d) of Civil Procedure Code on the ground that the suit is barred by the provisions of the said Act. The learned Judge upheld the contention of defendant 1 and hence this appeal.

5. I have heard at some length the learned counsel for the appellant. He contended that the action take by defendant 1 is totally malafide, vexatious and without authority of law. He submitted that admittedly he has not mortgaged the said flat to defendant 1. No security interest is created in the said flat and therefore it was not open to defendant 1 to initiate the proceedings. This is the main ground on which the plaintiff has attacked the action initiated by the defendant 1.

6. In my opinion there is no substance in this submission. It is an admitted position that defendant 2 has mortgaged the said flat to defendant 1.

Therefore, though the plaintiff has not mortgaged it, it cannot be denied that security interest has been created in respect of the said flat. Therefore, defendant 1 cannot be faulted for initiating action. Besides, the learned Judge has observed that defendant 2 through defendant 1 has given to the plaintiff a sum of Rs.2,87,470/- by way of cheque dated 21.11.01 drawn on defendant 1. Defendant 2 has also issued another cheque dated 31.10.01 drawn on defendant 1-Bank in favour of LIC Finance Housing Limited for Rs.4,12,389/- and LIC Finance Housing Limited has released the mortgage in favour of the plaintiff after the payment. Prima facie the learned Judge has come to the conclusion that the plaintiff was aware of the transaction between defendants 1 and 2. It is not possible to give any final opinion on this aspect at this stage. But in the aforesaid facts, prima facie, I do not find that the action taken by defendant 1 is fraudulent.

7. In this case it is not possible to hold that this case falls in the category of cases carved out by the Supreme Court in ***Mardia Chemicals Ltd. v. Union of India (2004) 4 SCC 311*** where the action of the secured creditor is on the face of it fraudulent, or where the secured creditor's claim is so absurd and untenable which may not require any probe whatsoever. Therefore the instant suit is barred by the provisions of the said Act.

8. No interference is necessary with the impugned order. Needless to say that the plaintiff will be entitled to adopt the remedy which is provided under the said Act if it is available to him. Needless to say that it is always open to the parties to settle the matter.

Appeal is rejected.

SMT. RANJANA DESAI, J.

sl.